IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEVEN MARSHALL, LONG TRAN and CHARLES JOHNSON Individually and on behalf of other similarly situated individuals Plaintiffs	§	
V.	§	C.A. NO. 3:10-CV-01422-K
EYEMASTERS OF TEXAS, LTD. and EYE CARE CENTERS OF AMERICA, INC. Defendants	§	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR CONDITIONAL CERTIFICATION OF REPRESENTATIVE ACTION, INCLUDING ORDER REQUIRING IDENTIFICATION OF PROSPECTIVE PLAINTIFFS AND APPROVING NOTICE TO POTENTIAL PLAINTIFFS

Plaintiffs, individually and on behalf of themselves and other similarly situated individuals, submit the following brief in support of their motion for conditional certification of this representative action under the Fair Labor Standards Act (the "FLSA"), against Eyemasters of Texas, Ltd. and Eye Care Centers of America, Inc., including an order requiring identification of prospective plaintiffs by Defendants and notice to prospective plaintiffs, and would show as follows:

I.

Introduction

As reflected in Plaintiffs' motion, Plaintiffs seek conditional certification of this civil action as a representative action pursuant to Section 216(b) of the FLSA.

Section II states the standards governing conditional certification and Section III the proper application of those standards in this civil action based on the undisputed facts referred to in Section II of the motion, and on the grounds referred to in Section III of the motion.

II.

Standards Governing Disposition of Motion

The United States Supreme Court has authorized court supervision of FLSA representative actions, including notice in representative actions. Hoffmann-LaRoche, Inc. v. Sperling, 118 F.R.D. 392, (D. N.J.), aff'd, 862 F.2d 439 (3d Cir. 1988), aff'd, 493 U.S. 165 (1989). As Hoffman-LaRoche recognized in applying Section 216(b) of the FLSA in a case under the Age Discrimination in Employment Act, also governed by Section 216(b):

> Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.
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> These benefits, however, depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.

493 U.S. at 170. Allowing early notice and full participation by the opt ins, "assures that the full 'similarly situated' decision is informed, efficiently reached, and conclusive." Hoffman-La Roche, 118 F.R.D. at 406. Once the notice is given and it becomes apparent that many individuals beyond the named plaintiffs will opt in, the Court will have the benefit of knowing the actual and final parties to the representative action. Notice is therefore actually required to allow the Court to finally "ascertain the contours of the action." Hoffman-La Roche, 493 U.S. at 172-73.

Based on Hoffman-LaRoche and its progeny, including the decision of Judge Fish of this Court in Ryan v. Staff Care, Inc., 497 F. Supp. 2d 820 (N.D. Tex. 2007), the procedure for judicial supervision of a representative action under the FLSA involves a process of conditional certification and approval of notice to be sent to potential plaintiffs. Ryan, 497 F. Supp. at 820 (N.D. Tex. 2007).

As recognized in Ryan, the Fifth Circuit Court of Appeals approved a so called a two-stage certification process in Mooney v. Aramco Services Company, 54 F.3d 1207, 1213-14 (5th Cir. 1995), overruled on other grounds by Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). The process, as characterized in Ryan:

> . . . satisfies the "similarly situated" requirement of § 216(b) with a two-stage analysis: (1) the notice stage; and (2) the certification stage. See id. at 1213-14. At the notice stage, the inquiry by the court is considerably less rigorous than the court's initial inquiry under the Rule 23 approach. See id. at 1214 ("[T]his determination is made using a fairly lenient standard . . ."). "[T]he district court makes a decision -- usually based only on the pleadings and affidavits which have been submitted -- whether notice should be given to potential class members." Id. at 1213-14. If the court allows for notification, the court typically creates conditional certification of a representative class and allows notice to be sent to the potential opt in plaintiffs. Id. at 1214.[1]
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> At the second stage of the two-stage process, the court determines whether the class should be maintained through trial. Typically, the second stage is precipitated by a motion to decertify by the defendant, which is usually not filed until discovery is largely complete. Id. By engaging in the two-stage approach, as opposed to the Rule 23 approach, "the court has much more information on which to base its decision, and makes a factual determination on the similarly situated question." Id. Should the court at this stage choose to decertify the class, the opt-in class members are dismissed from the suit without prejudice and the case proceeds only for the class representatives in their individual capacity. Id.

Ryan, 497 F. Supp. 2d at 820. Only at the second stage, at the close of discovery, does the Court need to make an actual factual determination as to whether the class members are similarly situated as

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1 Judge Fish rejected the alternative approach suggested by defendants of a process referred to as the Rule 23 approach, requiring a class action certification analysis to be applied to Section 216(b) represented actions. "Under [that] approach, class certification is identical to certification of a Rule 23 class." 497 F. Supp. 2d at 824. Judge Fish noted that Mooney itself followed the two-stage approach and also noted that "other judges in this district have applied the two-stage approach, citing Aguilar v. Complete Landsculpture, Inc., 2004 U.S. Dist. LEXIS 20265,*1 (N.D. Tex. 2004) (Fitzwater, J.) (referring to the two-stage approach as the "prevailing test among federal courts") and Barnett v. Countrywide Credit Industries, Inc., 2002 U.S. Dist. LEXIS 9099, *1 (N.D. Tex. 2002) (Lynn, J.) (stating that the two-stage approach is "the prevailing test among the federal courts"). Ryan, 497 F. Supp. 2d at 824 & n. 2. Judge Fish concluded that: "[b]ased on the Fifth Circuit precedent in Mooney and the history within this district regarding FLSA class certifications, the court adopts the two-stage approach. Id. at 824. See also Humphries v. Stream International, Inc., 2004 U.S. Dist. LEXIS 20465, 4-5 (Fitzwater, J.) (similarly noting Mooney and adopting two-stage approach).

necessary to determine whether trial or other proceedings should occur on the basis of treatment of the action as a representative action or only on the basis of treatment of the action as a multi-plaintiff action. Mooney, 54 F.3d at 1214. (Emphasis added).[2]

At the time the issue of conditional certification is presented, the issue "is whether, under the lenient standard of the notice stage, the plaintiffs, through their pleadings and affidavits, have demonstrated that the named plaintiffs are 'similarly situated' to the potential class members." Ryan, 497 F. Supp. 2d at 824. More specifically, as stated in Ryan:

> For the class representative to be considered similarly situated to the potential opt in class members, the class representative must be similarly situated in terms of job requirements and similarly situated in terms of payment provisions. See Dybach v. State of Florida Department of Corrections, 942 F.2d 1562, 1567-68 (11th Cir. 1991). "The positions need not be identical, but similar." Barnett, 2002 U.S. Dist. LEXIS 9099, 2002 WL 1023161, at *1 (quoting Tucker v. Labor Leasing, Inc., 872 F. Supp. 941, 947 (M.D. Fla. 1994). The "similarly situated" requirement of § 216(b) is less stringent than the "similarly situated" requirement of FED. R. CIV. P. 20 and 42. See Grayson v. K Mart Corporation, 79 F.3d 1086, 1096 (11th Cir.), cert. denied, 519 U.S. 982, 117 S. Ct. 435, 136 L. Ed. 2d 332 (1996). "A court may deny a plaintiff's right to proceed collectively only if the action arises from circumstances purely personal to the plaintiff, and not from any generally applicable rule, policy, or practice." Donohue v. Francis Services, Inc., Civ. A. No. 041-170, 2004 U.S. Dist. LEXIS 9355, 2004 WL 1161366, at *1 (E.D. La. May 24, 2004) (quoting Whitworth v.. Chiles Offshore Corporation, Civ. A. No. 92-1504, 1992 U.S. Dist. LEXIS 13405, 1992 WL 235907, at *1 (E.D. La. Sept. 2, 1992)).

Id. at 824-5. (Emphasis added). See also Grayson v. Kmart Corp., 79 F. 3d 1086, 1095 (11th Cir.), cert. denied, 519 U.S. 982 (1996) (noting distinction between "similarly situated" standard of FLSA and Rules 20 and 42 as well as Rule 23, stating standard "is considerably less stringent than the requirement of [Rule 23(b)(3)] that common question 'predominate,'" relying upon proposition that the "requirements for pursuing a §216(b) class action are independent of, and unrelated to, the requirements for class action under Rule 23 . . .," citing holding of La Chappelle v. Owens Illinois,

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[2] One court in this District has suggested that the two stages can be collapsed into one if substantial discovery has taken place. Clary v. Southwest Airlines, Inc., 2007 U.S. Dist. LEXIS 96411, 8 (N.D. Tex. 2007); Harris v. EFE Transportation Services, Inc., 2006 U.S. Dist. LEXIS 5143, 8-9 (N.D. Tex. 2006). Here, no discovery has taken place. Accordingly, collapsing of the two stages is not appropriate here.

Inc., 513 F. 2d 286, 289 (5th Cir. 1975) that Rule 23 and §216(b) actions are "mutually exclusive and irreconciliable").

This Court cannot too lightly regard Ryan's holding, and that of Grayson, upon which it relies, that the "similarly situated" requirement of Section 216(b) is not only substantially less stringent than the requirements found in Rule 20 relating to joinder and Rule 42 relating to severance, but even less stringent than those under Rule 23.

Rule 23 requires proof of sufficient numerosity to make joinder impracticable, commonality of questions of fact or law, typicality of the named plaintiffs' claims, adequacy of representation by the named plaintiff and a predominance of common questions of fact or law and superiority of a class action. Rule 20 allows the joinder as plaintiffs and defendants additional parties " if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Rule 42 permits consolidation of "actions involving a common question of law or fact."

Accordingly, while evidence of a single decision, policy or plan will meet the similarly situated standard, Hoffman-La Roche, 118 F.R.D. at 407, a unified policy, plan, or scheme is not required to satisfy the more liberal 'similarly situated' requirement of the FLSA." Grayson v. Kmart Corp. , 79 F.3d 1086, 1096 (11th Cir. 1996), cert. denied, 117 S. Ct. 435 (1996), relied upon in Ryan, 487 F. Supp. 2d at 825. (Emphasis added).

As further stated in Mooney and other cases, this Court, at the first stage of the two-stage certification process, should determine only whether named plaintiffs and prospective additional opt-in plaintiffs are "similarly situated" based upon the allegations in the complaint of the plaintiffs and sworn statements and other materials they offer. Mooney, 54 F.3d at 1213-14; Grayson, 79 F.3d at 1097; Hoffman-Laroche, 118 F.R.D. at 406-07 (D.N.J. 1988). The record need only be based upon substantial class-wide allegations. Humphries, 2004 U.S. Dist. LEXIS, at 6-7 citing Mooney, 54 F. 3d at 1214 (quoting Hoffman-Laroche).

In sum, the question is whether, as to employees holding certain named positions or performing certain duties identified by plaintiffs, plaintiffs have established "similarity of job requirements and similarity of pay provisions between themselves and the potential plaintiffs." Id. at 825.[3] The positions "need not be identical, but similar." Barnett v. Countrywide Credit Indus., Inc., 2002 WL 1023161, *5 (N.D. Tex. May 21, 2002) (Lynn, J.) (quoting Tucker v. Labor Leasing, Inc., 872 F. Supp. 941, 947 (M.D.Fla.1994)); Humphries v. Stream International, Inc., 2004 U.S. Dist. LEXIS 20465, 5-6 (N.D. Tex. 2004) (Fitzwater, J.); Aguilar v. Complete Landsculpture, Inc., 2004 U.S. Dist. LEXIS 20065, 5 (N.D. Tex. 2004) (Fitzwater, J.); see also Dybach v. State of Fla. Dept. of Corrections, 942 F.2d 1562, 1567-68 (11th Cir. 1991), relied upon in Ryan, 487 F. Supp. 2d at 825.

Applying Ryan to the facts of this case referred to in Section III of Plaintiffs' motion and in their supporting affidavits and evidence of another action similar to this one, and applying the specific legal principles referenced to in Section II and III of this brief, this Court should grant conditional certification of this representative action.

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[3] To impose a strict standard of proof at the notice stage would unnecessarily hinder the FLSA's purpose in allowing collective actions. Hoffman La-Roche, 118 F.R.D. at 407 ("[n]otice to absent class members need not await a conclusive finding of 'similar situations.'"). Hoffman-LaRoche, 493 U.S. at 170 ("The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged . . . activity.") Indeed, the necessity for this civil action is the result of understaffing by Defendants, and the FLSA overtime provisions at issue in this civil action were created precisely to encourage employment of as many people as possible. Schor, Juliet, "The Overworked American: The Unexpected Decline of Leisure," (1941), 66-67 (Congress believed that requiring employers to pay an overtime premium whenever an employee worked over forty hours in a workweek would motivate employers to hire additional workers rather than pay the overtime penality); Linder, Mark, "Time and a Half's The American Way," (2004) reviewed at www.gla.gov./opub/mlr2007/06/bookrevs.htm, ([FLSA overtime provisions] "intended to put pressure on employees to hire more workers rather than requiring those already on the payroll to work over 40 hours per week.")

III.

Application of Governing Standards

Plaintiffs submit that this Court should conditionally certify this representative action as to all employees serving as purported store general managers, retail managers and/or lab managers for Defendants who were improperly classified as exempt and not paid overtime compensation.[4] The required degree of similarity was described in Ryan as follows:

> [the] named plaintiffs have met their lenient burden of establishing that they are similarly situated to the potential class members. The affidavits of the plaintiffs establish that the potential class members had (or have) the same job requirements and pay provisions as the named plaintiffs. Furthermore, the actions by the defendants being complained of here were part of companywide policies classifying all employees in positions similar to the plaintiffs as exempt from the FLSA overtime requirements.

497 F. Supp. 2d at 825.[5] In addition to these factors, other courts making the notice inquiry have sought to determine if there are other individuals who desire to opt in and who are similarly situated to those bringing the suit. Dybach, 942 F.2d at 1567-68. Thus, if other parties join the suit by filing their consents, this is evidence of a desire on the part of others to join the suit that should be considered by the Court.

The facts referred to in Section III of the motion meet the similarity test and also reflect the interest of other potential representative action plaintiffs in joining this civil action. Insofar as similarity of circumstances is concerned, as in Ryan, the pertinent facts reflect that each of the twelve

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4 In Ryan, the plaintiffs requested "that the class be broad enough to encompass employees who worked for the defendants at locations outside the State of Texas." 497 F. Supp. 2d at 825. Judge Fish so authorized conditional certification of the class based upon evidence that employees within the class nationwide were being treated in the same manner. 497 F. Supp. 2d at 825-6.

5 As noted in Ryan, the potential need to create subclasses does not mitigate against conditional certification. 497 F. Supp. 2d at 826 n. 3.

currently joined plaintiffs performed common non-exempt job duties, under similar circumstances and for similar number of hours and worked under common pay provisions at Defendants' stores and that there are other similarly situated individuals who have not joined this civil action or yet been notified of this civil action. Motion, III pp. 3-6. Specifically, Plaintiffs in each case and others similarly situated have had the principal duty on a daily basis of selling and/or producing glasses and related items at Defendants' stores and also of performing similar manual tasks such as stocking shelves, straightening product, running case registers, greeting customers at the door, cleaning store bathrooms, tagging and unpacking merchandise, cleaning and dusting displays and the store, and mopping floors. Motion, III pp. 3-6. Plaintiffs and others similarly situated have carried out such duties, without being paid overtime compensation, at a level of hours of work consistently exceeding 40, and have made a written record of some or all of such hours, even though Defendants ordered employees to alter such time records and submit fraudulent records.

Separate and apart from the similarity of circumstances reflected in the work of those Plaintiffs who have joined this civil action, the continued filing of consents in this civil action by individuals who have learned of this civil action likewise establishes the interest in joinder referred to in Dybach.

This case is factually nearly identical to the case of Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233 (11th Cir. 2008), cert. denied, 2009 U.S. LEXIS 6829 (2009). In Morgan, the district court, acting pursuant to 29 U.S.C. §216(b), granted the plaintiffs' motion to facilitate nationwide class notice to "all former and current Store Managers who work and/or worked for the Defendant over the last three years." Morgan at 1243. The court found that Family Dollar's store managers were similarly situated within the meaning of 29 U.S.C. §216(b) because they:

1. worked 60 to 80 hours a week;
2. received a fixed salary and no overtime pay;

3. spent 75 to 90% of their time on non-managerial tasks such as stocking shelves, running the cash register, unloading trucks, and performing janitorial duties;
4. did not consistently supervise two or more employees;
5. lacked the authority to hire, discipline, or terminate employees without first obtaining permission from their district managers;
6. could not select outside vendors without their district managers' permission;
7. worked no less than 48 hours a week under the threat of pay cuts or loss of leave time; and
8. arrived at work before the store opened and stayed until after closing.

Morgan, 551 F. 3d at 1243.

The declarations submitted in support of Plaintiffs' motion reflect that this case is nearly identical because all Plaintiffs:

1. worked 45 to 60 hours per week;
2. received a fixed salary and no overtime pay;
3. spent 85 to 100% of their time on non-managerial tasks such as selling and/or producing eyewear as well as manual tasks such as stocking shelves, running the cash register, and performing janitorial duties;
4. lacked the authority to hire, discipline, or terminate employees without first obtaining permission from their district managers;
5. could not select outside vendors without superior managers' permission; and
6. arrived at work before the store opened and stayed until after closing.

Not only have Plaintiffs offered evidence making it evident that this action is on all fours with Family Dollar as to the exemption issue, the filing of an action against Defendant Eyemasters of Texas, Ltd. similar to this one in Illinois, a copy of which is attached to Plaintiffs' motion, makes it evident that this action is also on all fours in presenting a case of a national practice.

Without regard to the issue whether the Illinois action, explicitly limited to Illinois, has any effect upon certification of this action as an otherwise national collective action - - an issue which can be addressed by this Court separately - - the Illinois action establishes the absolute uniformity of Defendants' practices in regard to the matters put at issue in this action, including that Eyemasters of Texas, Ltd. is the common W-2 employer of employees of Defendants in Texas and otherwise.

Plaintiffs have submitted substantial evidence in support of both principal required elements of this motion, and so have quite obviously made the modest factual showing necessary for the Court to issue notice. It is more than enough under Ryan to show, as here, a common policy to deny overtime compensation to employees performing similar non-exempt duties in similar stores, with multiple similarly situated victims not limited to existing plaintiffs in the representative action. 2004 U.S. Dist. LEXIS 19638, at 9-10.[6] The burden is, as is made clear in Ryan, and before it, Barrett, Humphries and Aguilar, not heavy. Id., p. 10; Ryan, 497 F. Supp. 2d at 825 (positions need not be identical, but similar," and standard "less strict" than the "similarly situated requirement of Rules 20 and 42"); Humphries, 2004 U.S. Dist. LEXIS 20465, 6 ("fairly lenient" and requirement of "nothing more than substantial allegations"); Aguilar, 2004 U.S. Dist. LEXIS 20265, 8 ("lenient standard").

Given Ryan's adoption of Grayson, and Grayson's own reliance on a standard not only less stringent, but "considerably less stringent" than that under Rule 23, one that does not even require a unified, policy, plan or scheme, Plaintiffs' motion is clearly sufficient based on even the least generous characterization of the pertinent facts: that Defendants have collectively employed at least 10-15, but upwards of hundreds, of individuals working at similar stores, none performing exempt duties, and all being governed by the same provisions.

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[6] The Richards court further expressed the issue as whether "questions common to a potential group of plaintiffs would predominate in a determination of the merits in this case." However, Ryan rejected that particular burden as one imposed under Rule 23, applicable not to representative actions, but to class actions.

In sum, using either the test akin to the rule for class action certification under Rule 23 rejected in Ryan, or the liberal rule of Ryan, the facts underlying Plaintiffs' motion for conditional certification support it and, thus, mandates the giving of notice to prospective plaintiffs similarly situated to Plaintiffs.

Defendants may contend that certification should be denied by reference to the decision of Judge Solis in Harris v. FFE Transportation Services, Inc., 2006 U.S. Dist. LEXIS 51437 (N.D. Tex. 2006) and like decisions of federal district courts in Texas denying conditional certification.

Apart from the fact it was decided before Ryan, which rejects a Rule 23-type similarity test involving considerations of predominance, rather than approving such a test as does Harris (2006 U.S. Dist. LEXIS 51437, at 14-17), Harris is not properly analogized to this case.

Harris involved a potential class of representative plaintiffs defined by reference to six different positions with different job functions, while here, as the facts referred to in Plaintiffs' motion make clear, Plaintiffs and all other potential representative plaintiffs, whatever title they had, in each case performed similar non-exempt duties. Motion, III pp.3-6. There is no "considerable variation in the actual employment settings" as in Harris, nor "job duties [which] were quite different" among Plaintiffs, as in Harris, nor (except for a limited period as to one category of employee) payment of overtime compensation in accordance with the FLSA to some Plaintiffs but not others, as in Harris, much less major differences "admitted" by Plaintiffs, as in Harris. Id. at 9-11 & n. 3. Moreover, there are no differences in the possible defenses to Plaintiffs' claims as between Plaintiffs, as in Harris; the single defense against the claims of all Plaintiffs would be that they were, at the times overtime compensation was allegedly due, exempt employees not entitled to overtime compensation.

Whether or not Harris presented that distinctive case in which, as characterized in Ryan, "the action arises from circumstances purely personal to the plaintiff, and not from any generally applicable rule, policy, or practice," this civil action does not. Indeed, in Harris, Judge Solis observed that the plaintiffs did not allege any commonality beyond being all employed by the same defendant. Id. at 13. The plaintiffs in Harris did not even clearly allege a common policy or practice, much less, as in this case, offer substantial evidence out of the defendant's mouth reflecting the existence of such a common policy or practice. Id. at 14.

Finally, even if Harris, and other cases cited by it[7] purportedly involved the necessity of a highly individualized inquiry merely to determine whether the plaintiffs were improperly classified as exempt, the determinations to that effect in Harris and such other cases were based upon a "predominance" analysis rejected in Ryan, and this case does not remotely involve a case in which "differences among the potential plaintiffs predominated over the similarities" so as to involve any considerations of fairness or manageability. Id. at 14.

In Aguilar, indeed, the court rejected an argument that differences in job descriptions prevented certification. The court held that "no distinction should be made," relying not only upon the Barnett "similar, but not identical" standard, but even the looser standard that "[a]n FLSA class determination is appropriate when there is a demonstrated similarity among the individual situations . . . some factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged [policy or practice]." Aguilar, 2004 U.S. Dist. LEXIS 20265, at 13-15, citing Crain v. Helmerich and Payne Int'l Drilling Co., 1992 WL 91946, at *2 (E.D. La. Apr. 5, 1992) (quoting Heagney v. European Am. Bank, 122 F.R.D. 125 (E.D.N.Y. 1988)). Judge Fitzwater further stated that '[a] court can foreclose a plaintiff's right to proceed collectively only if the action relates to specific circumstances personal to the plaintiff than any generally applicable policy or practice, citing Burt v. Manville Sales Corp., 116 F.R.D. 276, 277 (D. Colo 1987).

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[7] Aguirre v. SBC Communications, Inc., 2006 U.S. Dist. LEXIS 22211 (S.D. Tex. 2006) (significant variation in tasks with implication of different results for conclusion whether employees exempt) ; Holt v. Rite Aid Corp., 333 F. Supp. 2d 1265, 1274-75 (M.D. Ala. 2004)(same); Reich v. Homier Distributing Co., 362 F. Supp. 2d 1009, 1013-14 (N.D. Ind. 2005)(same); Morisky v. Pub. Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 498 (D. N.J. 2000)(no showing of identity or similarity of duties between plaintiffs).

Two other recent Texas federal courts decisions other than Ryan, by Judge Rosenthal in the Southern District of Texas, offer additional compelling examples of the reasons why Harris and other cases like it may not properly be relied upon. Quintanilla v. A&R Demolition, Inc., 2006 U.S. Dist. LEXIS 34033 (S.D. Tex. 2004); Prater v. Commerce Equity Management Company, Inc., 2007 U.S. Dist. LEXIS 85338 (S.D. Tex. 2007).

In Quintanilla, the court, addressing the fact that the proposed representative class involved employees in different worksites, dismissed the significance for certification purposes of that fact by reference to the "evidence showing that their employer followed a consistent practice or policy of refusing to pay overtime for working more than 40 scheduled hours in a single work week." 2006 U.S. Dist. LEXIS 34033, at 46. That is precisely what the evidence shows here.[8]

Addressing the fact of different job titles and alleged duties, the Quintanilla court, as well as Judge Fish in Ryan, rejected that fact as a basis to deny certification, Id. at 48-49. It recognized that the titles were subject to employer discretion and that the ultimate standard is not identity, but similarity. Id.

In Prater, Judge Rosenthal was again faced with arguments against certification based on alleged differences in title and duties as well as the fact that some positions held by the plaintiffs were properly exempt. 2007 U.S. Dist. LEXIS 85338, at 3-5. Essentially repeating the analysis offered in Quintanilla, the court relied upon findings that individuals with differences in titles were, among other things, "all treated the same" and "were pretty much on the same level." The court further held:

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8 The court in Quintanilla did indicate that it would refuse to adjudicate on a collective basis any issue of deductions from highly for lost or damaged equipment, but there is no similar issue in this civil action. Id. at 47.

> The parties further dispute whether these aggrieved individuals are similarly situated to warrant issuing notice of a collective action. The defendants contend that the plaintiffs improperly seek to include employees with different job duties, different job titles, different compensation (hourly or salaried), and different FLSA exemption status. They argue that misclassification cases involving employees with different job duties "are particularly unsuitable for collective action treatment." (Docket Entry No. 14 at 3).
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> The putative class members in a FLSA collective-action suit must be similarly situated in terms of job requirements and similarly situated in terms of payment. Ryan v. Staff Care, Inc., 497 F.Supp.2d 820, 825 (N.D. Tex. 2007) (citing Dybach v. State of Fla. Dept. of Corrections, 942 F.2d 1562, 1567-68 (11th Cir. 1991)). A plaintiff need only demonstrate a reasonable basis for the allegation that a class of similarly situated persons exist. Lima v. Int'l Catastrophe Solutions, Inc., 493 F. Supp. 2d 793, 798 (E.D. La. 2007).
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> In this case, the parties have submitted conflicting affidavits about the plaintiffs' duties, how they were paid, and the work generally performed in the leasing offices of the defendants' properties. The plaintiffs assert that all the apartment office employees basically performed the same duties, were entitled to receive overtime payment, but were not paid overtime. The defendants contend that the employees had varying job duties and that the salaried employees--leasing managers, assistant property directors, property directors, and the marketing director--are properly classified as exempt employees and that only the leasing agents are paid hourly.
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> The plaintiffs have made the necessary minimal showing that they and other leasing staff employees are similarly situated in terms of job requirements. Although Dilick's affidavit states that the plaintiffs had different positions and different duties, the plaintiffs assert in their affidavits that they all performed the duties of a leasing agent and "all did the same thing which included performing leasing, administrative, and marketing tasks." (Docket Entry No. 19, Ex. 1, Affidavit of Jasmine Prater, P 5). The plaintiffs stated:
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>> Leasing staff [working for the defendants] consists of leasing agents, administrative personnel and management. Leasing staff and administrative personnel, as well as management, were all treated the same. No matter what your title is, you could be asked to do almost anything, and were pretty much on the same level. If you were in the room at the time and something needed to be done, you had to do it regardless of whose job it was. There were not really any lines of distinction between positions.
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> (Docket Entry No. 1, Ex. 4, Affidavit of Jasmine Prater, P10; Affidavit of Christina Stroyick, P11). The plaintiffs state in their affidavits that they all worked under Dilick's direction and policies.

Id. at 16-18.

The court also categorically rejected an argument that variation in day-to-day work for any Plaintiff or between Plaintiffs could preclude certification. It stated:

> The defendants argue that because the putative class members' duties varied from day to day, they are not similarly situated for purposes of a collective action. See Aguirre v. SBC Commc'ns, Inc., No. H-05-3198, 2007 U.S. Dist. LEXIS 17259, 2007 WL 772756, at *12

> [(S.D. Tex. 2007 March 12, 2007) ("[E]mployees . . . are not 'similarly situated' for the purposes of an 'opt-in' FLSA class if their day-to-day job duties vary substantially.") (citing Morisky v. Pub. Serv. Electric & Gas Co., 111 F.Supp.2d 493, 498 (D.N.J. 2000)); see also Holt v. Rite Aid Corp., 333 F. Supp. 2d 1265, 1270-72 (M.D. Ala. 2004); Morisky, 111 F. Supp. 2d at 498. The defendants have failed to show that these variations are material. Although some of the apartment office staff duties may have varied day-to-day, the evidence suggests that the focus of the leasing staff duties was to show the property to potential renters, manage renter requests and rents, and perform general administrative tasks. Some day-to-day variation in how and when the staff performed these tasks does not preclude conditional certification and the issuance of notice. See Foraker v. Highpoint Southwest, Servs., L.P., No. H-06-1856, 2006 U.S. Dist. LEXIS 63951, 2006 WL 2585047, at *4 (S.D. Tex. Sept. 7, 2006) ("While undoubtedly the [plaintiffs'] duties vary to some degree from day-to-day and possibly from location to location . . . [t]he fact that on different days customers may have questions for a [plaintiff employee] does not [*20] change the thrust of the job duties described . . . ."); see also Holbrook v. Smith & Hawken, Ltd., F.R.D. , 2007 U.S. Dist. LEXIS 75549, 2007 WL 2982239, at *4 (D.Conn. Oct. 11, 2007) ("The court need not find uniformity in each and every aspect of employment to determine a class of employees are similarly situated."); Berger v. Cleveland Clinic Found., No. 1:05 CV 1508, 2007 U.S. Dist. LEXIS 76593, 2007 WL 2902907, at * 20 (N.D. Ohio Sept. 29, 2007) ("[S]imilarly situated does not mean identically situated.") (quoting Wilks v. Pep Boys, No. 3:02-0837, 2006 U.S. Dist. LEXIS 69539, 2006 WL 2821700, at *3 (M.D. Tenn. Sept. 26, 2006)).

Id. at 18-21.

Finally, the court in Prater rejected an argument against certification based on the fact that some plaintiffs were paid on an hourly basis and some on a salary basis: because subclasses or two separate classes may be created. Prater stated:

> The record shows that the defendants treated the leasing agents as hourly and the leasing managers, assistant property directors, property directors, and the marketing director as exempt salaried employees. The defendants assert that Prater, Stroyick, and other salaried employees were exempt from the FLSA, while Murillo and other leasing agents were not. The plaintiffs dispute these assertions and contend that despite the titles, all performed the same duties and that the salaried employees were misclassified as either exempt or as independent contractors. The plaintiffs allege that apartment office employees were entitled to overtime pay but were denied it and that the defendants failed to keep proper employee records and to withhold social security or FICA taxes. The record supports certification of a class of hourly employees and a class of allegedly misclassified salaried employees. Under the lenient Lusardi standard, the plaintiffs have made the necessary minimal showing that there are two classes of apartment office employees who are similarly situated to each other in terms of position and payment.
>
> The defendants argue that the hourly employees' claims require individual treatment of each putative class member's hours worked, see Basco, 2004 U.S. Dist. LEXIS 12441, 2004 WL 1497709, at *4, and that the misclassification claims will require a fact-intensive analysis of each putative class member's duties. See Mike v. Safeco Ins. Co. of Am., 274 F. Supp. 2d 216, 220 (D.Conn. 2003). In response, the plaintiffs contend that all the apartment office

> employees, regardless of title or exempt status, performed basically the same duties and were treated the same way. The current record does not show that the claims of those classified as hourly employees require such an individualized analysis of each employee's schedule and duties as to preclude collective-action treatment. Nor does the record show that collective-action treatment is improper for the claims of those classified as exempt. Collective-action treatment is proper for misclassification claims when the employees have essentially the same basic job responsibilities. See Holbrook, 2007 U.S. Dist. LEXIS 75549, 2007 WL 2982239, at *4 ("[The plaintiff] contends that all [Assistant Store Managers] maintained the same basic job responsibilities and were all classified as exempt . . . but that ASMs basic job responsibilities could not have qualified them as exempt executives under the statute. Such commonality in position, classification, and treatment . . . constitutes a common scheme or plan that renders all ASMs similarly situated for FLSA purposes.").

Id. at 16-23.

As noted in footnote 5, Judge Fish in Ryan held that the potential ability to create separate clauses or subclasses dictates against denial of certification. 497 F. Supp. 2d at 826 n. 3. Alternatively, as held by Judge Fitzwater, this Court, in Aguilar, employees from different employers may be similarly situated when they are joint employers under the FLSA. 2004 U.S. Dist. LEXIS 20265, 9-10. In fact, Judge Fitzwater specifically noted that "[t]here is precedent in this district for conditionally certifying an FLSA class that consists of employees of related employers, citing Antenor v. D & S Farms, 88 F. 3d 925, 929 (11th Cir. 1996) and Alba v. Brian Loncar, P.C., 2004 U.S. Dist. LEXIS 20477 (N.D. Tex. 2004). Finally, Judge Fitzwater noted that the issue whether defendants were joint employers could be deferred until a later stage. Id. at 10-11.

In sum, considering Ryan, as well as Aguilar, Quintanilla and Prater, good cause exists for this Court to immediately conditionally certify this civil action as a representative action under the FLSA and authorize direct notification to prospective representative action plaintiffs with cooperation of Defendants.

The statute of limitations for a claim under the FLSA is two years, or three years if a willful violation is found. 29 U. S.C. § 216(b). Accordingly, as to employees of Defendants within the potential representative action class who worked for Defendants at any time with the last three years, their potential recovery may be diminished with the passing of each day. It is thus critical that the prospective representative action plaintiffs in this action consisting of all such employees for the last three years receive notice of their ability to assert FLSA claims as soon as possible. Plaintiffs have prepared a proposed form of direct notice consistent with the one reviewed by the Supreme Court in Hoffmann-LaRoche. and the notices approved in Ryan, Aguilar and Barnett.

Only Defendants have access to a complete list of names of employees employed in positions similarly situated to those held by Plaintiffs and employed by Defendants during the three years prior to the filing of Plaintiffs' respective consents to join this action, and their current or last known addresses. Under Hoffmann-LaRoche, this Court should accordingly order Defendants to provide Plaintiff a complete list including such information to facilitate the direct notice, and approve the notice to be sent to such current or former employees as potential plaintiffs.

IV.

UNAVAILABILITY OF DEFENSE ON MERITS AT THIS STAGE

In anticipation of the argument of Defendants in response to this motion that this Court should not conditionally certify this civil action as a representative action because they may have defenses on the merits, Plaintiffs would note that the existence of a dispute over the proper classification of Plaintiffs and prospective plaintiffs as exempt may not preclude conditional certification as requested.

First, as a general matter, it is necessary to ascertain the individuals who will be involved in the representative action before final factual determinations are made. Hoffman-LaRoche, 493 U.S. at 172-3.

Second, in a case where misclassification in particular is an issue, it is not necessary that the issue of misclassification be determined prior to conditional certification. Humphries, 2004 U.S. Dist. LEXIS 20465, 9 (exemption issue not one to be addressed at point of, conditional certification); Richards, 2004 U.S. Dist. LEXIS 19648, at 17 n. 6 (D.Conn 2004) (rejecting issue of consideration of merits while noting allegations of Plaintiff did not suggest to court that plaintiff was exempt).

Third, as noted, Plaintiffs are only required to make substantial allegations concerning misclassification, the single determining issue of liability. Richards, 2004 U.S. Dist. LEXIS 19638, at 17 n. 6 ("Richard's allegations do not suggest to the court that he is exempt pursuant to the plain language of the regulations."). For reasons made evident in Section III and further addressed below in Plaintiffs' concurrently filed motion for conditional certification of representative action, Plaintiffs have done so.

V.

CONCLUSION

As noted by Judge Fish in Ryan, citing Hoffman-La Roche,"collective actions under the FLSA are generally favored because such actions reduce litigation costs for the individual plaintiffs and create judicial efficiency by resolving in one proceeding of 'common issues of law and fact arising from the same alleged . . . activity.' " Ryan, 497 F. Supp. 2d at 824. This Court should not "haphazardly prohibit the notice to potential FLSA class members . . . so as to infringe the liberal and curative purpose of the [FLSA]"). Melendez Cintron v. Hershey P.R., Inc., 2005 U.S. Dist. LEXIS 10261, 27 (D.P.R. 2005). Rather, applying the standards established by Mooney and recently applied in Ryan, this Court should grant conditional certification and approve the notice proposed in this FLSA representative action. A good sample notice is provided in Barnett, 2004 U.S. Dist. LEXIS 9099, 7-14, see also Bell v. Mynt Entertainment, LLC, 223 F.R.D. 680 (S.D. Fla. 2004) (rejecting defense proposal to require inclusion of clause informing employees that they could be liable for defense attorneys fees and costs); Johnson v. HH3 Trucking Inc., 2003 U.S. Dist. LEXIS 23115 (N.D. Ill. 2003) (rejecting proffered defense warning about imposition of costs).

WHEREFORE, Plaintiffs pray for all relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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